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CANCELLED

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IN THE HIGH COURT OF JUDICATURE AT BILASPUR

MISC. APPEAL NO. 1163 OF 2005

APPELLANT
PLAINTIFF

Dharamchandra Agrawal, S/o Late Shri Lakshmi Narayan Agrawa, aged about 46 years R/o Tilak Marg, Lohar Road, Puranaganj Chowk, Rajnandgaon, Tahsil & Distt. Rajnandgaon (Chhattisgarh)

P.R. No. 2459/05
Presented by Shri Akhilesh Kharay
dated 15/9/05

VERSUS

RESPONDENT
DEFENDANT

Joaravarmal Daddha,S/o Late Shri Kaluram Dagga, aged about 79 years, R/o Cinema Line, Rajnandgaon, District Rajnandgaon (Chhattisgarh)

APPEAL UNDER ORDER XLIII RULE 1 OF CODE OF CIVIL PROCEDURE, 1908, AGAINST ORDER PASSED BY LEARND DISTRICT JUDGE RAJNANADGAON IN RCS NO. 6-A/05

AFR

HIGH COURT OF CHHATTISGARH : BILASPUR

Misc. Appeal No. 1163 of 2005

Appellant/ Plaintiff : **Dharamchandra Agrawal**

Vs.

Respondent/ Defendant : **Joaravarmal Daddha**

Appellant/plaintiff by Shri Manindra Shrivastava, Sr. Advocate with Shri Rakesh Dubey,Advocate.
Respondent/defendant by Shri R.M.Daga, Advocate with Shri M.P.Khajanchi & Shri Qamrul Aziz, Advocates.

JUDGMENT
(Delivered on 05/01/2008)

Dhirendra Mishra, J

This is the appellant's miscellaneous civil appeal directed against the impugned order by which his application for temporary injunction restraining the respondent from alienating the suit property in a suit for specific performance of contract, has been rejected. (Parties hereinafter referred to as per their description before the trial Court.)

2. Brief facts of the case necessary for adjudication of this appeal are that a suit was filed by the plaintiff on the averment that parties to the suit entered into an agreement for sale on 02.08.2004 for a consideration of Rs. 24,59,100/- and the plaintiff paid Rs. 2 lakh by way of advance as per agreement and the further amount of Rs.5,000/- by way of advance was payable by 01st October 2004 and accordingly, the amount so agreed was paid by the plaintiff. As per stipulation of the said agreement the plaintiff was to pay the balance of the consideration by 30th November 2004 and get the sale deed executed from the defendant in his favour, failing which the agreement will be null and void and the amount advanced was liable for

forfeiture. It was also stipulated in the said agreement that in case the defendant failed to execute the sale deed, the plaintiff could get the sale deed executed by initiating legal proceedings and in that event the defendant shall also be liable to pay damages to the plaintiff. It was further case of the plaintiff that as per agreement the payment was to be made as per actual measurement and the liability of payment of dues etc. was to be the liability of the defendant. However, the agreement is silent regarding disclosure of the title papers.

3. It is further pleaded by the plaintiff that the defendant avoided disclosure of the title and other information with respect to loan etc. against the agreemented property despite being called for the same and therefore, the sale deed could not be executed in the absence of disclosure of the above information though the plaintiff was ready and willing to perform his part of the contract. A legal notice dated 22nd December 2004 calling upon the defendant to execute the sale deed was sent, however in reply to the above notice the defendant asked for interest at the rate of 18% over the balance amount from 30th November 2004 to 03rd January 2005 and only on that condition he expressed his readiness to execute the sale deed. Thereafter correspondences continued between the parties and the defendant bonafidely expressed his willingness to execute the sale deed by 24th February 2005 on the condition that the plaintiff deposits 18% additional interest as demanded.

4. Thus from pleadings of the respective parties, in sum substance, the issue involved in the suit is as to which of the parties was responsible for non-execution of the sale deed within the stipulated period of 30th November 2004 and whether in the facts and circumstances of the case the time was essence of the contract.

5. Learned counsel for the appellant submits that the only thing to be considered while disposing of application for grant of temporary injunction under Order 39 Rule 1& 2 of the C.P.C. is whether the plaintiff has a prima facie case and to ascertain this fact the real thing to be seen is only that the

plaintiff's claim is not frivolous or vexatious and that there is a serious question to be tried. It is not necessary for the plaintiff at this stage to satisfy the Court that he has a clear legal right to enforce the contract against the defendant and the only requirement is to establish that the plaintiff has a fair question to raise as to the legal right claimed by him in the suit. He further argues that while considering the application, however, learned District Judge rejected the application by recording a finding that the plaintiff has failed to show any evidence that he was ready and willing to perform his part of the contract under the agreement, ignoring the fact that the plaintiff had paid a sum of Rs. 7 lakh by way of advance which itself expressed his willingness to perform his part of the contract.

6. Relying upon the judgment in the matter of **Shankarlal Debiprasad Rathore Vs State of M.P. and others** reported in **1978 M.P.L.J. 419**, it is argued that at the stage of deciding application for temporary injunction disputed question of fact or difficult questions of law should be left to be decided at the conclusion of the trial.

7. Further relying on the judgment reported in **AIR 1977 S.C. 1005** in the matter of **Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and another**, it is argued that fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract, particularly when the contract relates to sale of immovable property the presumption is that the time is not the essence of the contract and the intention to treat time as essence of the contract may be evidenced by circumstances which should be sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract.

8. On the other hand, learned counsel for the respondent supporting the impugned order submits that the exercise of discretion by the learned trial Court is based on the pleadings of the respective parties and documents available on record. The Court below has arrived at the conclusion that the plaintiff has failed to establish prima facie case in his favour. It is argued

that in a suit for specific performance of contract as per provisions of Section 16(c) of the Specific Performance Act (in short 'the Act') it is incumbent upon the plaintiff to plead and prove the continuous readiness and willingness from the date of the contract to the time of the hearing to perform his part of the contract and failure to make good that averment leads to inevitable dismissal of the suit and to ascertain whether the plaintiff was ready and willing to perform his part of the contract, the circumstances of the case and conduct of the parties are relevant. Grant of decree of specific performance is a discretionary relief and it is not necessary to grant such relief simply because it is legal to do so. It is argued that in a suit for specific performance of the contract, the plaintiff is required to aver that he has also been ready and willing to perform the essential terms of the contract and the averment should conform in terms of Form 47 and 48 of the C.P.C.

9. Learned counsel for the respondent in support of his contention places his reliance on the following judgments;

1. **AIR 1928 Privy Council 208, Ardeshir H. Mama Vs. Flora Sassoon,**
2. **1969 (2) S.C.C. 539, Ouseph Varghese Vs. Joseph Alev and others**
3. **(1989) 4 SCC 313, Abdul Khader Rowther Vs. P.K. Sara Bai and others**
4. **(1995) 5 SCC 115, N.P. Thirugnanam (dead) By L.Rs. Vs. Dr. R.Jagan Mohan Rao and others**
5. **(1996) 5 SCC 589, Lourdu Mari David and others Vs. Louis Chinnaya Arogiaswamy**
6. **(1998) 2 SCC 226, Bismillah Begum (Smt.) Dead by L.Rs. Vs. Rahmatullah Khan (dead) by L.Rs.**
7. **(2000)6 SCC 566, Ajaib Singh & others Vs. Tulsi Devi (Smt.)**
8. **(2002) 8 SCC 146, Nirmala Anand Vs. Advent Corporation(P) Ltd. and others.**

9. **(2002) 9 SCC 582, Pushparani S. Sundaram and others Vs. Pauline Manomani James (deceased)**

10. **(2003) 10 SCC 390, Manjunath Anandappa Urf Shivappa Vs. Tammanasa and others**

11. **(2004) 7 SCC 251, Pukhraj D. Jain and others Vs. Go. Gopalakrishna**

10. Learned counsel for the respondent submits that the plaintiff entered into the agreement after getting himself satisfied regarding title of the vender and after perusing the documents relating to title and possession of the property duly described by the boundary marks in the deed and in the aforesaid circumstances, the parties to the agreement have signed the agreement with open eyes which does not stipulate any obligation on the part of the respondent/defendant to disclose any information. Even otherwise, there is no documentary evidence to show that the information as claimed was sought before the stipulated date i.e. 30th November 2004. From perusal of the deed prima facie time appears to be essence of the contract inasmuch as there is a stipulation that the vender shall be at liberty to dispose of the agreemented property after stipulated dated. The vender bonafidely allowed the extended time to get the sale deed executed up to 24th February 2005, even then the plaintiff did not avail the opportunity simply because he was not in a position to perform his part of the contract.

11. The scope of interference in the discretionary order in the matter of granting or refusing order of temporary injunction in appeal is very limited and it is not open to the appellate Court to substitute its own exercise of discretion for the discretion already exercised by the judge and it is not permissible unless the appellate Court reaches to the clear conclusion that there has been a wrongful exercise of discretion and no weight or no sufficient weight has been given to the relevant considerations urged by the appellant.

12. Learned counsel for the respondent further relies upon the judgments reported in **1941 (II) All England Law Reports 245, Charles Osenton &**

Co. Vs. Johnston and **AIR 1988 (Supp) S.C.C. 796, Collector of Customs, Bombay Vs. Swastic Woollens (P) Ltd. and others.**

13. I have heard learned counsel for the parties.

14. The learned District Judge after considering the pleadings and documents adduced by the respective parties has arrived at the conclusion that the plaintiff does not have a prima facie case and on this ground the impugned order rejecting the application of temporary injunction has been passed. The submission of learned counsel for the appellant is summarized as under;

(1) that the plaintiff had entered into an agreement and paid a sum of Rs. 7 lakh as part performance of the contract. He has offered that he shall always be ready and willing to perform the remaining part of the contract. However, the deed could not be executed because of inaction on the part of the vender as he did not disclose the relevant information/documents pertaining to the agreemented property to satisfy the plaintiff that the defendant had clear and marketable title on the basis of which the sale deed could be executed and thus the deed could not be executed because of the lapse on the part of the defendant.

(2) that the defendant did not reach to the registration office on 30th November 2004 and started demanding additional interest of 18% by way of reply to the notice sent by the plaintiff, which is contrary to the terms of the contract.

(3) that from perusal of the stipulation in the agreement and other attending circumstances, it is not evidenced that time was the essence of the contract.

On the other hand, the submission of learned counsel for the respondent may be summarized as under;

(1) that the averment in the plaint is not complete in terms of Section 16(c) of the Act as also in terms of Form 47 and 48

of the C.P.C. which is mandatory for grant of discretionary decree for specific performance of title.

(2) that the plaintiff was never ready and willing to perform his part of the contract which is evident from the conduct of the plaintiff as he did not take any step to get the sale deed executed before the stipulated date and even after the time was extended.

(3) that the learned District Judge has passed the impugned order by properly and validly exercising the discretionary power vested in him and the same cannot be substituted at the appellate stage as the same is based on proper appreciation of material available on record and sound judicial principles.

15. On the basis of the pleadings and documentary evidence available on record it cannot be said that the Court below has exercised its discretion by ignoring the submissions made by the plaintiff which may result in any irreparable injury to him. In any case irrespective of the prima facie case of the parties, in the present situation the balance of convenience lies in favour of the defendant because in case an order of temporary injunction is passed against the defendant restraining him from alienating the property in question and ultimately the defendant succeeds, in that case he shall be deprived of the right to transfer his property for the period for which the suit is pending and thus irreparable injury may be caused to him. On the other hand, in case the plaintiff succeeds and the suit is decreed and in the absence of any prohibitory order the defendant alienates the property during pendency of the suit, in that case such transfer shall be subject to the decree ultimately passed and the consequences shall follow and the plaintiff will not be subjected to any irreparable injury.

16. Thus in view of the aforesaid analysis, the appeal preferred by the appellant fails and the same is accordingly dismissed. No order as to costs.

Sd/-
DHIRENDRA MISHRA
Judge